STATE OF MICHIGAN

COURT OF APPEALS

JACK M. MOULIK,

Plaintiff-Appellant,

v

THE STATE POLICE RETIREMENT SYSTEM and THE STATE POLICE RETIREMENT BOARD,

Defendants-Appellees.

UNPUBLISHED
June 1, 1999

No. 200087
Ingham Circuit Court
LC No. 94-077707 AA

JACK M. MOULIK,

Plaintiff-Appellant,

v

RITA PONTZ, MICHAEL D. ROBINSON, THOMAS A. TALIAFERRO, DIANE K. DEWITT, P. D. CHANEY, JAMES NEUBECKER, THE STATE POLICE RETIREMENT BOARD, THE STATE POLICE RETIREMENT SYSTEM, MICHIGAN STATE POLICE, DEPARTMENT OF MANAGEMENT & BUDGET, and THE STATE OF MICHIGAN, jointly and severally,

Defendants-Appellees.

No. 204527
Ingham Circuit Court
LC No. 95-080849 CZ

JACK M. MOULIK,

Plaintiff-Appellant,

v

No. 204528
Court of Claims

MICHAEL D. ROBINSON, THOMAS A. TALLAFERRO, DIANE K. DEWITT, P. D. CHANEY, JAMES NEUBECKER, THE STATE POLICE RETIREMENT BOARD, THE STATE POLICE RETIREMENT SYSTEM, MICHIGAN STATE POLICE, DEPARTMENT OF MANAGEMENT & BUDGET, and THE STATE OF MICHIGAN, jointly and severally,

Defendants-Appellees.

LC No. 95-015812 CM

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

In Docket No. 200087, plaintiff appeals by leave granted from a trial court order affirming a state police retirement board decision that plaintiff was disqualified from receiving retirement benefits because he was discharged for breach of the public trust. In Docket No. 204527, plaintiff appeals as of right from a trial court order dismissing his complaint in a related case pursuant to MCR 2.116(C)(6). In Docket No. 204528, plaintiff appeals as of right from a court of claims' order dismissing an identical complaint in that court pursuant to MCR 2.116(C)(6). We reverse and remand in Docket No. 200087, but affirm in Docket Nos. 204527 and 204528.

I

This case involves the interpretation of several provisions of the state police retirement act of 1986, MCL 38.1601 *et seq*.; MSA 5.4002(1) *et seq*. Plaintiff began his employment with the Michigan Department of State Police on April 14, 1968, when he entered recruit school. He graduated from recruit school and took the oath of office on July 10, 1968. In 1993, while plaintiff was serving as commander of the Northville State Police Post, it was discovered that state funds were missing. On April 21, 1993, plaintiff was suspended pending an investigation for embezzlement. Plaintiff eventually pleaded guilty of embezzlement. He was sentenced to five years' probation, forfeited his severance pay of $29,000.00, and was ordered to pay restitution of $109,356.00.

On April 27, 1993, while he was suspended, plaintiff gave notice of his intent to retire pursuant to § 24(1) of the state police retirement act, MCL 38.1624; MSA 5.4002(24), effective the day of his suspension, and to collect retirement benefits. Plaintiff was advised that his earliest effective retirement date was June 1, 1993,[1] and was informed that he remained an employee of the Michigan State Police until his retirement became effective. In a letter dated May 21, 1993, which was received on May 24, 1993, plaintiff gave notice that he was resigning and retiring effective immediately.

A trial board convened on May 25, 1993, and plaintiff was found guilty as charged. The trial board unanimously recommended termination. Plaintiff was then informed by Director Robinson that his termination would be effective May 28, 1993.

On June 10, 1993, plaintiff was informed that, because of his dismissal for breach of the public trust, his application for retirement benefits had been denied pursuant to § 23(2) of the state police retirement act, MCL 38.1623(2); MSA 5.4002(23)(2). Plaintiff appealed the denial of retirement benefits and the matter was submitted to a hearing officer on stipulated facts. The hearing officer recommended that retirement benefits be denied because plaintiff was discharged for breach of the public trust. The state police retirement board subsequently entered an order adopting that recommendation.

Plaintiff appealed the retirement board's decision to the trial court, which affirmed the board's decision. Plaintiff sought leave to appeal in this Court and, while the application for leave to appeal was pending, filed identical lawsuits in both the trial court and the court of claims, alleging numerous different counts. Both complaints were subsequently dismissed pursuant to MCR 2.116(C)(6), based upon the courts' determination that they involved the same issues that were litigated in the prior proceeding. Plaintiff appealed each of those decisions as of right (Docket Nos. 204527, 204528), and we granted plaintiff's application for leave to appeal the trial court's decision affirming the state retirement board (Docket No. 200087). The appeals were subsequently consolidated for this Court's consideration.

II

In Docket No. 200087, we find that the decision of the state police retirement board is not authorized by law or supported by competent, material, and substantial evidence on the whole record. See Const 1963, art 6, § 28; MCL 24.306; MSA 3.560(206); *Rose Hill Center, Inc v Holly Twp*, 224 Mich App 28, 31; 568 NW2d 332 (1997). Accordingly, the trial court erred in affirming the decision of the state police retirement board. See *Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).

We conclude that, at the time plaintiff was suspended, he had over twenty-five years of "credited service," MCL 38.1603(1); MSA 5.4002(3)(1), and that he effectively retired from his employment, pursuant to § 24(1) of the retirement act, on May 24, 1993. Underlying this conclusion is the trial court's determination that defendants regularly credit as prior service time spent by a recruit in training before taking the oath of office. We find no error in this determination by the trial court.[2]

With this backdrop then, the resolution of this appeal turns on the interpretation of MCL 38.1624(1); MSA 5.4002(24)(1). Section 24(1) provides:

> A member who has 25 years or more of credited service under this act or former Act No. 251 of the Public Acts of 1935, or both, may retire upon his or her written application to the retirement board, stating a date, not less than 30 nor more than 90 days after the execution and filing of the application, he or she desires to retire. However, a member who becomes 56 years of age shall retire. A member retiring

under this subsection shall be entitled to receive a retirement allowance equal to 60% of his or her final average compensation.

We find the language of § 24(1) to be clear and unambiguous. As such, judicial construction is neither required nor permitted, and we must apply the language of the statute as written. See *Rose Hill Center*, *supra* at 32. The Legislature is presumed to have intended the meaning plainly expressed in the statute. *Institute of Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). Here, both the hearing officer and the trial court read § 24(1) as containing conditions not stated therein. Although reading the "breach of the public trust" language of §§ 23(2) and 30(1) into § 24(1) provides a rationale for denying retirement benefits to plaintiff, to do so ignores the basic principle of statutory construction that the omission of a provision from one part of a statute, which is included in another part, should be construed as intentional. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Courts "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Id*. In short, a court may not do on its own accord what the Legislature has not seen fit to do. *Id*.

Section 24(1) of the state police retirement act provides that a member with twenty-five years of credited service "may retire" and "shall be entitled" to a retirement allowance of sixty percent of his final average compensation. The only condition regarding eligibility for retirement benefits imposed by § 24(1) is a minimum thirty-day delay for an effective date. Here, plaintiff designated a retirement date of May 24, 1993, which is more than thirty days after the date of his written application. The applicant's motivation for retiring and the fact that he breached the public trust are not considerations under § 24(1). Furthermore, there is no legal support for the trial court's conclusion that the years during which plaintiff embezzled funds from the state cannot be considered "credited service." On the contrary, the phrase "credited service" is expressly defined in the act,[3] and therefore the statutory definition controls. See *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996). Similarly, the trial court's conclusion that plaintiff could be dismissed for breach of the public trust, after he had effectively retired, finds no support in the law and therefore is clearly erroneous. See *Schultz v Oakland Co*, 187 Mich App 96; 466 NW2d 374 (1991). Accordingly, plaintiff could not have been discharged for breach of the public trust on May 28, 1993, because he had effectively retired on May 24, 1993, four days earlier.

A review of the legislative history of the act discloses that the prior version of § 24(1),[4] which similarly provided for retirement after twenty-five years of service, also did not contain "breach of the public trust" language, even though that language twice has been added to other provisions, which were precursors of current §§ 23(2) and 30(1). See 1974 PA 214 and 1982 PA 532. Furthermore, when the Legislature enacted the present statute pursuant to 1986 PA 182, it failed to include any comparable "breach of the public trust" language in § 24, despite the benefit of three Attorney General opinions which, based in part on *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 663-664; 209 NW2d 200 (1973), opined that a legislatively enacted condition of faithful performance would be reasonable and not subversive of the protections of Const 1963, art 9, § 24. See OAG, 1977-

1978, No 5188, p 116 (May 5, 1977); OAG, 1985-1986, No 6294, p 67 (May 13, 1985); OAG 1985-1986, No 6301, p 103 (June 14, 1985).[5]

Albeit reluctantly, we are constrained to conclude that the absence from § 24(1) of a "faithful performance" provision or similar "breach of the public trust" language in effect created a loophole through which plaintiff was able to slip. The Legislature did not rectify this situation until it promulgated the public employee retirement benefits forfeiture act, 1994 PA 350.[6] Had this forfeiture act been in effect at the time of plaintiff's retirement, the court disposing of the criminal charges against plaintiff would have had discretion to forfeit plaintiff's retirement benefits.

Defendants' reliance on *Gretzen v Michigan State Police*, unpublished memorandum opinion of the Court of Appeals, issued November 28, 1995 (Docket No. 168265), is misplaced. First, an unpublished opinion is not precedentially binding. MCR 7.215(C)(1). Second, the plaintiff in *Gretzen* was dismissed pursuant to §§ 23(2) and 30(1), both of which contain "breach of the public trust" language. *Gretzen* does not discuss § 24(1).

Defendants' reliance on *Kerner v State Employees' Retirement System*, 72 Ill 2d 507; 382 NE2d 243 (1978), is likewise misplaced. The Illinois pension code contains a provision not found in the Michigan retirement act. Specifically, § 14-199 of the Illinois pension code provides:

> None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee.

The Michigan statute does not contain any similar provision. Thus, absent a similar provision in Michigan's statute, *Kerner* is not persuasive authority.

Similarly, *Robbins v Police Pension Fund*, 321 F Supp 93 (SDNY, 1970), does not support defendants' position. The plaintiff in *Robbins* did not elect retirement before dismissal or forfeiture of his right to apply for a pension. Instead, the plaintiff chose to submit to the discretion of the police commissioner in an effort to retain his position and right to a pension. *Id*. at 94-95. The Court found that the plaintiff, by not applying for a pension before his termination, failed to "meet a condition precedent to his right to a pension" and therefore was subject to loss of his pension rights after he was dismissed for neglect of duty. *Id*. at 97-98. Here, plaintiff did timely apply for retirement benefits, and he effectively retired before he was formally discharged. Thus, plaintiff fulfilled the condition precedent.

Finally, we find no support for defendants' argument that plaintiff's suspension was the functional equivalent of a "dismissal." Plaintiff had the right to retire while charges were pending. See Michigan State Police Official Order No. 30, ¶ 9(A).

We recognize that plaintiff breached the public trust. His reprehensible conduct is contrary to the public interest and incompatible with the interests of the state police. However, under the facts and circumstances of this case, and the applicable law at the time of plaintiff's retirement, we are constrained to conclude that plaintiff is entitled to his retirement benefits. The state police retirement board did not

have authority to sanction plaintiff by forfeiting his retirement benefits once he retired under § 24(1), and the trial court erred in affirming the board's decision.

Our holding renders it unnecessary to address plaintiff's remaining issues. We note, however, that the United States Supreme Court has held that "civil forfeitures generally . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause." *United States v Ursery*, 518 US 267; 116 S Ct 2135, 2138; 135 L Ed 2d 549 (1996); see also *In re Forfeiture of $25,505*, 220 Mich App 572, 583; 560 NW2d 341 (1996). Moreover, a person may be subject to both criminal and civil sanctions for the same act without offending the Double Jeopardy Clauses of the United States and Michigan Constitutions.[7] *People v Everard*, 225 Mich App 455, 465; 571 NW2d 536 (1997). We also find no merit to plaintiff's due process argument. The record shows that plaintiff was not deprived of his right to notice and the opportunity to be heard. See *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995). Moreover, plaintiff was subject to the decision making of nine members of the state police retirement board, who considered the recommendation of the hearing officer and decided to follow it. The fact that the board erroneously decided that plaintiff should be disqualified from receiving retirement benefits does not establish that plaintiff was denied his right to due process.

III

Upon de novo review, we affirm the decisions of the trial court and the court of claims granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(6) in Docket Nos. 204527 and 204528. See *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997). MCR 2.116(C)(6) permits summary disposition when "[a]nother action has been initiated between the same parties involving the same claim." We conclude that "another action" for purposes of MCR 2.116(C)(6) includes an action initiated before an administrative agency where it involves the same parties and the same claims. See *Nummer v Dep't of Treasury*, 448 Mich 534, 541-542; 533 NW2d 250 (1995); *Darin v Haven*, 175 Mich App 144, 151; 437 NW2d 349 (1989). The trial court and the court of claims did not err in finding that plaintiff's respective actions effectively involved the same claim decided by the state police retirement board, which was subsequently affirmed by the trial court and was pending on appeal in this Court when plaintiff initiated his actions in those courts. See *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). MCR 2.116(C)(6) does not require that all of the issues be identical, only that the two suits "be based on the same or substantially the same cause of action." *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). As the trial judge here stated, "[t]hese are claims addressing the one theory under many, many, many legal guises, but they are all the same claim."

Plaintiff argues that he properly could file the same claims in the court of claims that were litigated in the administrative agency because they involve claims for money damages against the state. See MCL 600.6419(1)(a); MSA 27A.6419(1)(a). This argument is without merit. See *Nummer*, *supra* at 543-544. Plaintiff's claims were fully adjudicated at the administrative agency level and were subject to direct review in the trial court. See Const 1963, art 6, § 28; MCL 600.6419(4); MSA 27A.6419(4).

Finally, plaintiff's reliance on *Lumley v Bd of Regents for the Univ of Mich*, 215 Mich App 125; 544 NW2d 692 (1996), is misplaced. *Lumley* does not stand for the proposition that a party who receives a final agency determination and appeals it to the trial court and then to this Court, may, while the appeal is pending, file a new complaint in the trial court and the court of claims alleging identical claims, albeit couched in different theories.[8]

Docket No. 200087 is reversed and remanded for proceedings consistent with this opinion. Docket Nos. 204527 and 204528 are affirmed. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski

[1] In its response to plaintiff's notice of his intent to retire, the state police retirement board stated that "the effective date of retirement must be the first of the month following at least 30 days from the date of your application." In making this determination, the board apparently erroneously applied MCL 38.1622; MSA 5.4002(22), which provides that an applicant will not receive his *retirement allowance* until the first of the month following the month in which the applicant terminates state service. MCL 38.1624(1); MSA 5.4002(24)(1) requires only a minimum thirty-day period before the retirement becomes effective.

[2] Indeed, this determination is supported by the fact that, if training time were not considered, plaintiff would not have served twenty-five years until July 10, 1993; however, after plaintiff initially announced his intent to retire "immediately" by letter dated April 27, 1993, he received two letters informing him that his earliest retirement date was June 1, 1993, not July 10, 1993.

[3] MCL 38.1603(1); MSA 5.4002(3)(1) defines "credited service" as "the sum of the prior service and membership service credited to a member's account."

[4] See 1935 PA 251, § 5, as amended by 1956 PA 146.

[5] The factual scenario presented in OAG No. 6301 is very similar to the facts and circumstances of this case.

[6] MCL 38.2701 *et seq.*; MSA 3.982(1) *et seq*.

[7] US Const, Am V; Const 1963, art 1, § 15.

[8] See *Bays v Dep't of State Police*, 89 Mich App 356; 280 NW2d 526 (1979).